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Vanessa Countryman  
Secretary, Securities and Exchange Commission  
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Washington, DC 20549-1090

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Re: File Number S7-20-21

Dear Ms. Countryman

Below are my comments on the Commission's proposals concerning Rule 10b5-1 and Insider Trading. While my views are informed by the time I spent as a compliance practitioner in this field, the views are entirely my own personally and should not be deemed in any way to represent either the circumstances within or the views of any prior employer.

The Commission is right to address the potential for abuses that may occur within the current Rule. I believe that Rule 10b5-1 creates an important protection for insiders by providing a safe harbor, where appropriate, which would be undermined by opportunities for abuse. I believe that material and nonpublic information can be available to many insiders beyond Directors and Section 16 Officers and that the growth in participation in our public markets has greatly increased the need for rules that promote responsible trading practices. I believe this also presents an opportunity to better educate insiders at all levels and to streamline compliance mechanisms.

Underlying many of my comments is the observation that Company employees broadly fall into two categories when it comes to trading in equities issued by their employer: employees whose interest is speculative and trade either because they are bullish or bearish about their Company's prospects; and those who regularly liquidate the equity component of their compensation to meet their cash flow needs. I believe it is fruitless to try and distinguish between these groups and I believe the proposals are crafted in such a way as to provide a level of protection for all employees without creating unreasonable restriction for those whose trading is not purely speculative.

I have chosen not to comment on areas where I do not have a strong view and provide my comments from the perspective of someone who was both an insider subject to the Rule and a compliance manager responsible for assisting and monitoring other insiders.

### Proposals for a cooling off period

I support the Commission's proposals for a cooling off period because this proposal limits the opportunity for abuse without creating undue restriction on access to the public markets.

As a device to counter abuse, a cooling off period is effective because it prevents individuals from using a 10b5-1 trading plan as a cover for acting quickly. It is my view that there can be correlation between the speed and frequency of an individual's trading and risk. Cooling off periods reduce that risk. They do, of course, create a limit for individuals who wish to participate in the market. However, the protection of a safe harbor offered by a 10b5-1 trading plan is a benefit that is traded for this limitation. The proposed cooling off period simply creates at the outset of the trading plan the conditions for which 10b5-1 plans are intended for: the ability of an insider to plausibly demonstrate that planned trades are free from the influence of material and non-public information (MNPI). I believe when questions are raised about the intentions of an employee this is damaging both to the reputation of the employee and of the Company. Adoption of this proposal, together with certain other matters discussed below, will reduce the need for such inquiries when employees take advantage of a 10b5-1 trading plan.

The proposed 120-day cooling off period is neither too long nor too short because:

- It is sufficiently long considering the pace at which MNPI often takes shape. In addition to financial results, matters such as the likely outcome of regulatory determinations, serious litigation, the progression of significant merger or acquisition discussions and key business deals, often develop significantly within this time period. Given that all such material developments are subject to the periodic reporting requirements, this cooling off period will likely alleviate the risk at initiation of a 10b5-1 trading plan.
- Vesting periods for stock-based compensation typically exceed 120 days and – so long as a 10b5-1 trading plan is adopted promptly – will therefore not disadvantage insiders who are in the habit of liquidating stock-based compensation as it vests.

One possible criticism of the cooling off period is that individuals may be precluded from acting quickly in a volatile market. Conditions such as those that occurred in late February and early March of 2020 as volatility rose dramatically due to the emerging pandemic may be used as an argument against a cooling off period which could effectively “lock in” some insiders, reducing their ability to stem losses. It is my view, however, that this is precisely the type of environment where risk of misuse of MNPI increases. In times like this, individuals seek information or may receive information about the organization before it is able to be properly described to other investors. The pace of internal discussion often increases during times of stress and insiders at all levels may be called upon to assist the company with its responses. As

a result, there can be a greater flow of MNPI at these times and a greater disparity of knowledge between investors. A cooling off period on new plans provides an additional level of control which is especially relevant if an individual seeks the safe harbor protection at a moment of heightened risk.

#### Proposals for limiting the defenses to a single plan per year

I support this proposal. Limiting the defense to one single plan during a 12-month period effectively removes the ability of an insider to claim the legal form of protections when engaging in substance in unrestricted trading through multiple plans. It will have no detrimental effect on those insiders whose interest is in liquidating their stock-based compensation as it vests because deferred compensation grants are typically made annually. Consequently, a single plan per year is sufficient for this purpose.

#### Proposed Certification Requirement

I support the proposal. Certifications are helpful compliance tools that have greater impact when performed at the point of a transaction than when certifications are made, for example, as part of an annual training. Embedding a certification requirement into the transaction at the creation of a 10b5-1 trading plan is therefore a useful device. It serves to educate and remind individuals of their obligations at the very point when they are contemplating action.

I would not impose a requirement on the Company to maintain or provide these certifications to the Commission because this may undermine a useful reinforcement to the individual that they own responsibility for their trading practices.

#### Requirements should apply to all insiders, not just Directors and S. 16 Officers and Companies should remind employees about their responsibilities and educate them about available protections

One consequence of the increased use of stock-based compensation plans in certain companies is that individuals who are not heads of departments or senior executives or policy decision-makers may increasingly hold and trade equity issued by the company. Furthermore, it can be difficult in practice to conclude what constitutes MNPI in advance and retroactive assessments are subject to confirmation bias. Individuals can become exposed to MNPI in many ways that are not always easily tracked, including by attending internal business meetings, especially key

Committee meetings, being part of critical deal-teams, monitoring key risks, overseeing serious litigation, acting as service providers to significant clients or being involved in negotiations with third parties. Exposure can also occur accidentally. Finally, the advancement of technology has greatly increased the ability of information to spread widely and rapidly. The combination of these factors make a case for extending the safeguards and the protections of 10b5-1 trading plans further than Director and Officer as currently defined.

For these reasons, I would advocate that the Commission consider making the same set of rules on cooling off period, limitations to one plan per year as well as certifications apply to all employees who seek the protection of a 10b5-1 trading plan.

A single set of rules makes it easier to reinforce and learn them and simplifies internal compliance efforts, making them more effective.

Given the essential protections that a 10b5-1 trading plan offers, I believe every employee should be educated by the Company about their responsibilities and about the mechanisms available to them for this safe harbor whenever a Company offers its employees the opportunity to acquire equity either through a stock purchase or stock-based deferred compensation plan.

In the event that the Commission determines it should continue to differentiate between insiders, the Commission should consider expanding the definition of Officers for the purpose of this Rule. In addition to the current definitions, the Commission should consider explicitly applying these requirements to all members of:

- a Company's senior Executive Committee, or its equivalent
- a Company's Disclosure Committee
- a Company's deal team organization that are tasked with evaluating potential acquisitions and dispositions
- a Company's executive Risk Committee

Furthermore, if a Company deems it necessary to restrict an individual from trading during certain quiet periods such as around the quarterly reporting period or other significant events, there should be a rebuttable presumption that these individuals must also be deemed Officers for the purpose of this Rule. If a Company is reasonably and sufficiently concerned to require a trading restriction, it is inconsistent then to presume that the individual is not also at risk for trading while in possession of MNPI. The Company should be required to remind these individuals of their obligations and to inform them that 10b5-1 trading plans are an option for them. Following this, cooling off periods and certifications should then be required for these individuals.

#### Proposals to require plans to be 'operated' in good faith

Even when an employee establishes a predetermined plan to 'set-it-and-forget-it', circumstances can change. Typically, a life event can lead to changes in the timing of when funds are needed. These can lead to modifications to a previously established plan and so long as there is a reasonable basis for this, modifications should be uncontroversial. They should also be exceptional. Adding the requirement for plans to be operated in good faith is helpful because it creates an additional requirement that compliance programs will focus on this when selecting items to review.

#### Proposal for disclosure of policies

I support the proposal to require disclosure of a Company's insider trading policies. Many companies are already in the practice of doing this. Difference in policy arise in the degree to which companies permit or restrict trading and the amount of explicit guidance and advice that is offered. Such disclosure may assist investors evaluating the risks of insider advantage.

I do believe the term should be 'Director and Employee trading policies', not 'Insider trading policies' to prevent too narrow a view of who is covered under these policies.

#### Proposal for enhanced disclosure on the timing of stock options granted in proximity to release of MNPI

The fact of an options award shortly before or after the release of MNPI does not, in and of itself, indicate that the award took advantage of the MNPI but the additional disclosure as proposed would help investors understand the effectiveness of the incentive compensation plan for the most senior officers and whether the intended effect of these plans are ameliorated in any way by such awards.

## Conclusion

The Commission's proposals overall allow Rule 10b(5) to revert to being a protective device for insiders who own and wish to trade Company shares. Insiders trade some level of restriction for this protection. For the reasons described above, I believe these proposals create a reasonable trade-off.

Sincerely,

Anthony O'Reilly